No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE CITY OF LOS ANGELES,

Petitioner,

vs.

JOHNNY LEE JACKSON,

Respondent.

Supplemental Appendix to
Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY LEE JACKSON, Plaintiff - Appellee	)	No. 90-55728
	)	D.C. No. CV-87-105RSWL
v.	)	
	)	ORDER
DARYL GATES; CITY OF LOS ANGELES, Defendants-Appellants.	)	

Before: PREGERSON, Circuit Judge

The City of Los Angeles's motion to stay the mandate is hereby GRANTED. Pursuant to Fed. R. App. P. 41(b), the issuance of the mandate is stayed for thirty days from the date this order is filed. Thereafter, the mandate shall issue or the stay of the mandate shall continue as dictated by Fed. R. App. Proc. 41(b). Filed March 3, 1993

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY LEE JACKSON, Plaintiff-Appellee,	)	No. 90-55728
	)	D.C. No. CV-87-105 RSWL
v.	)	
	)	ORDER
DARYL GATES; CITY OF LOS ANGELES, Defendants-Appellants.	)	

Before: PREGERSON, CANBY, and RYMER, Circuit Judges

Judges Pregerson and Canby have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Rymer would grant the petition for rehearing but reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Filed February 19, 1993

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHNNY LEE JACKSON, Plaintiff, v. DARYL GATES; CITY OF LOS ANGELES, Defendants,	No. D.C. No. CV-87-105 RSWL ORDER

Defendants in the above captioned case have moved for a new trial pursuant to Fed. R. Civ. P. 59 or in the alternative for judgment notwithstanding the verdict pursuant to Fed. R. Civ P. 50(d). The plaintiff filed an opposition. The matter was set for oral argument on February 26, 1990 at 9:00 a.m. Attorneys for the parties presented further oral argument and responded to the Court's inquiries.

Now after having reviewed the papers and oral argument presented in support of and in opposition to the motion, the Court hereby issues the following:

Defendants' motion is DENIED.

BACKGROUND

Plaintiff Johnny Lee Jackson was a police officer with the Los Angeles Police Department. On or about February 13, 1986, another police officer, who during the trial was referred to as Officer X, came under investigation and surveillance by the Internal Affairs Division ("IAD") because his superior officer suspected him of drug use. At the time, X was a friend of Jackson's.

On February 13, 1986 the IAD observed Jackson with X travelling together in X's car to pick up a woman

while both officers were off duty. After the two officers and the woman drove to another location, Jackson remained in the car while X and the woman went into an apartment building. X returned alone shortly and the two officers then went to Jackson's home where they remained for about an hour. X and Jackson then drove in X'!s car back to the apartment building where X and the plaintiff had gone to pick up the woman. X again entered the building alone.

During the time that Jackson was alone in the car, a female undercover officer approached him and offered to share a marijuana cigarette with him. Jackson refused the offer and the undercover officer left. After X returned to the car, the two officers went back to where Jackson's car had

been left. Jackson went home alone and, along with X, did not report to work the following day.

The next week, IAD investigators observed the plaintiff in X's car at a public park. The two drank beer and talked for about an hour. Jackson then went home alone.

Between 1:00 and 2:00 a.m. the following morning, the investigators went to Jackson's home and requested that the plaintiff provide a urine sample. Jackson called the Los Angeles Police Protective League ("LAPPL") for advice. He was then transported to Parker Center where he received information from an LAPPL employee representative. Jackson was also informed by the investigators that he would be charged with insubordination and be punished if he refused to submit

to urinanalysis. Jackson still refused to provide a urine sample. The plaintiff then left Parker Center with the LAPPL employee representative.

Defendant Daryl Gates, LAPD Chief of Police, ordered Jackson to be tried by a Board of Rights. At the conclusion of that proceeding Gates ordered that Jackson be discharged. Jackson "grieved" the discharge and the Police Commission approved, ratified, and affirmed Gates' decision. On July 24, 1986, the plaintiff was removed from his position with total loss of pay and benefits.

The matter then went to an arbitrator pursuant to state law. The arbitrator determined that the City had not complied with Article 37 of the Memorandum of Understanding ("MOU"), which required that there must be

substantial evidence to indicate that an employee had ingested illegal substance before ordering him to provide a urine sample. The plaintiff was reinstated with backpay and benefits, less interest, on December 1, 1987 pursuant to the arbitrator's order.

The plaintiff had filed suit on February 17, 1987, prior to the arbitrator's order. The jury trial was commenced on September 6, 1989.

On September 14, 1989, a jury verdict for plaintiff was returned awarding him $154,747.00 for infringement of his 4th Amendment rights. This Court granted defendants' motion brought pursuant to Fed. R. Civ. P. 60(b) on November 29, 1989 to allow the present motion to be filed.

DISCUSSION

I. Bases for new trial

A. Alleged erroneous jury instructions on reasonableness

The defendants argue that the Court's instructions to the jury are erroneous because the instructions (i.e., Nos. 44, 45, and 45.1) state that there must be "an individualized, articulated, reasonable suspicion" before a search can be lawfully compelled. The defendants contend that the U.S. Supreme Court cases of National Treasury Employees Union v. Von Raab, ___U.S.___, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), ("Von Raab") and Railway Labor Executive's Association v. Skinner, ___U.S.___, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) ("Skinner") establish that probable

cause requirements are not prerequisite to lawful searches in the form of urinanalysis testing if the governmental interest is great enough. Thus, the defendants contend that a proper analysis in determining whether a search is lawful pursuant to the Fourth Amendment includes a balancing test between the governmental interests served by a urinanalysis test and a government employee's privacy interest. The Court denied the inclusion of the defendants' proposed jury instructions which would have instructed the jury to apply this balancing test (i.e., Proposed Jury Instructions Nos. 101, 103, 109, and I11, hereinafter referred to collectively as "the balancing test instructions")

The Court's refusal to include the balancing test instructions is

consistent with its previous order which denied defendants' summary judgment motion based on this same argument. In the Court's July 31, 1989 order denying defendants' summary judgment motion, the Court distinguished the searches in Von Raab and Skinner from the one in the present case by noting three particular factors: (1) the government demonstrated a compelling state interest; (2) the policies were calculated to minimize the intrusive nature of the suspicionless search and to preserve the dignity of employees subject to testing, achieved primarily by giving notice to affected employees; and (3) the testing procedures were "triggered" by an objective factor (e.g. promotion, or a railway accident).

The defendants point out that a recent Appeals Court decision which interprets Von Raab and Skinner, National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989) ("Cheney) does not limit the two Supreme Court case to such narrow readings. Cheney upheld Army personnel regulations which allowed random drug testing for particular classes of military personnel. The D.C. Circuit's opinion rejected the proposition that the analyses in Skinner and Von Raab were inapplicable to its case because the testing procedure considered in the two Supreme Court cases were conducted on a post-accident, or pre-ascension basis while the Army's regulations allowed for purely random testing. Id. at 609. The Cheney court therefore applied the balancing test outlined in

Skinner and Von Raab in determining whether a random urinanalysis "search" allowed by the Army's regulations was "reasonable" in light of the Fourth Amendment. See also Harmon v. Thornburah, 878 F.2d 484 (1989).

The plaintiff initially responds to this argument by contending that the regulations considered in Cheney do not really call for "random" testing. The plaintiff notes that the regulations quoted in the opinion also called for the testing procedures to be conducted on pre-ascension, post-accident, and probable cause bases. 884 F.2d at 605. Jackson reasons that there would be no reason to continue to require probable cause for some tests if purely random testing was allowed, and thus the stated random testing is not purely

random testing, but involves some type of suspicion basis.

This argument fails for several reasons. The opinion notes that the language of the regulations had been altered from "periodically . . . on the basis of neutral criteria" to "periodically on a random basis." 884 F.2d at 606 fn. 3. Thus, the intent to allow random testing is fairly evident. In addition, the D.C. Circuit's discussion of the federal employees' argument against the policies makes it clear that the federal employees found the policies offensive because of the allowance of randomness. 884 F.2d at 608-09. Lastly, plaintiff's argument relies on consistent reasoning throughout governmental regulation, and this cannot be safely presumed.

However, the D.C. Circuit's application of the Von Raab/Skinner analysis in determining whether the random searches were allowable under the Fourth Amendment is still not dispositive of the issue of this Court's alleged error in jury instructions. In each of these cases, a general scheme of suspicionless searches was analyzed through a balancing test of governmental interest versus individual privacy rights. The defendants have maintained throughout this case that Jackson was not subjected to a random testing program, but was forced to submit to a urinanalysis test based on "some individualized suspicion." Def. Memo, p. 9, In. 11. Thus, it would seem that the defendants recognize that random testing is distinguishable from

suspicion-based testing. Yet after making this distinction, the defendants argue that the Court should have instructed the jury to apply the balancing test in determining whether the suspicion reached the level of "reasonable." Def. Memo, p. 9 In. 12-16.

The Court should have properly instructed the jury about governmental interests and the balancing test if the jury was asked to determine whether procedures that allowed suspicionless 4th Amendment searches were reasonable. In this case, however, the Article 37 of the MOU and the LAPD Manual § 3/836.05 required an officer to submit to urinanalysis testing only when there were objective symptoms of being under the influence or substantial evidence to indicate

ingestion or absorption. In other words, the applicable regulations required a suspicion basis for a urinanalysis search. As discussed above, the defendants have concurred that the search of Jackson was done because of individualized suspicion. The jury was properly informed about the MOU and LAPD Manual regulations. Jury Instruction 88(u).

In sum, two different analyses apply when determining the reasonableness of a urinanalysis drug testing. When the questioned policy allows for suspicionless searches, then a determination of the reasonableness of the policy requires the application of the Von Raab/Skinner balancing test. By contrast, when the applicable policies require suspicion before allowing a urinanalysis testing, then

determining the sufficiency of the suspicion requires evaluation of whether it was an individualized, articulable, reasonable suspicion.

The Supreme Court has not articulated this distinction. However, the facts in Von Raab, Skinner, Cheney, and Thornburgh present this important factual distinction of 4th Amendment search schemes which were questioned for their lack of a suspicion requirement. Since the present case involves a suspicion based search of an individual as opposed to a random department-wide search, the standards for reasonable suspicion which existed prior to Von Raab and Skinner would still be the correct law for this case. Thus, the Court's instructions were not erroneous.

The Court does not find Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987), to be persuasive authority in this case. The Eleventh Circuit, in a factual situation similar to the present one, noted the government's compelling interest as well as the individualized suspicion in affirming a summary judgment for the reasonableness of a particular search. Id. at 1511. However, the Court did not hold that these were all necessary considerations in the analysis for determining whether an individual search is reasonable.

B. Alleged instructional error for municipal liability

The defendants contend that the Court erred in its jury instructions regarding municipal liability because the temporary property deprivation

caused by the termination was not a constitutional tort. Furthermore, the defendants argue that municipal liability can only stem from the actions of one with final policy making authority. Pembaur v. City of Cincinnati, 475 U.S. 483, 106 S.Ct. 1292, 1299-1300 (1986).

The defendants' first argument seems to be a misconstruing of the plaintiff's claim for relief. Jackson sought damages from the deprivation of his fourth amendment rights to only be subject to a reasonable search. Termination and the resulting injuries incurred (besides backpay) were consequential to both the constitutional torts for the jury-determined unreasonable search, and the "obey now-grieve later" policy of the City. Thus, the legal conclusion that

the temporary property deprivation suffered by plaintiff did not amount to a constitutional injury since he was eventually restored is not applicable in this case.

The defendants' second argument has good legal foundation, but similarly fails because of a misinterpretation of the plaintiff's claim for relief. The defendants correctly note that Pembaur requires that municipal liability requires the action of an official with final policy making authority regarding that action, and that state law determines whether an official has final policy making authority. 106 S.Ct. at 1300. In addition, the defendants cite L.A. Police Protective League v City of Los Angeles, 163 Cal.App.3d 1141, 1146, 209 Cal.Rptr. 890, 892 (1985) as authority

for the proposition that the arbitrator has been given the power to resolve the dispute over the authority of the City to discharge the plaintiff.

However, again the defendants focus on the termination as being the constitutional injury. Plaintiff's claim is for the injury incurred due to the violation of his 4th Amendment rights. When Jackson refused to submit to what he believed to be an unlawful search, he ran against the LAPD's "obey now-grieve later" policy. His termination resulted from violating this policy (i.e., insubordination). Gates, who the defendants admitted had policy-making authority, acted in response to the "obey now-grieve later" policy. Though this policy itself is not unconstitutional, the fact that it causes a constitutional deprivation is

what is important. McKinley v. City of Eloy, 705 F.2d 1110, 1117 (9th Cir. 1983).

In addition, L.A. Police Protective League does not hold that the arbitrator is the official with the final policy making authority in regards to suspension and termination. It does uphold the arbitrator's power to resolve such disputes. However, arbitration is a process beyond the policy making powers of the police administration, and the arbitrator is not a City official.

Thus, the Court's instructions requiring a finding of municipal liability if the search were found to be unreasonable are not erroneous.

II. Bases for judgment n.o.v.

A. The undisputed facts allegedly show that the search was reasonable as a matter of law.

Defendants next claim that even accepting the standards required by the Court's instructions that the facts demonstrate that the search was reasonable. After recounting the evidence that was presented at trial regarding the basis of the defendants' suspicion of Jackson, the defendants assert that the suspicion was individualized, articulable, and reasonable.

Though the suspicion of Jackson was individualized in the sense that he was not merely one of a class of individuals, none of the bases for

suspicion actually linked the plaintiff with use of a drug. The investigators who ordered Jackson to submit to a urinanalysis test did not even have direct evidence of Jackson's usage of drugs that was old, or of little credibility. Since consideration of a judgment n.o.v. involves looking at the facts in the light most favorable to the prevailing party, the facts could be said to show that the investigators acted with unreasonable suspicion since Jackson's actions could have been viewed as being purely legal.

B. The undisputed facts allegedly show that municipal liability was not incurred

Defendants have also requested a judgment notwithstanding the verdict on the issue of municipal liability. In

essence, the defendants have rehashed the same argument made in their request for a new trial due to alleged erroneous jury instructions on municipal liability. Thus, the Court refers to its discussion in Section I. B. of this order in denying the defendants' motion for judgment n.o.v. on the basis of municipal liability.

III. CONCLUSION

For the foregoing reasons, defendants' motion for new trial or, in the alternative, judgment notwithstanding the verdict are DENIED.

IT IS SO ORDERED.

DATED: APRIL 23 1990

RONALD S. W. LEW

United States District Judge

CV 87-1085 RSWL Jackson v. Gates et al.
Defendant's motion for new trial or in the alternative for judgment notwithstanding the verdict.

Filed April 24, 1990

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHNNY LEE JACKSON, Plaintiff, v. DARYL GATES; CITY OF LOS ANGELES, Defendants.	No. D.C. No. CV-87-105 RSWL ORDER

On June 13, 1989 defendants Daryl F. Gates and the City of Los Angeles ("Gates") filed a second motion for summary judgment in the above captioned action. Plaintiff Johnny Lee Jackson ("Jackson") timely filed opposition and Gates filed a reply. The motion was originally scheduled for hearing on July 17, 1989 but was removed from the Court's law and motion calendar for

disposition based on the papers pursuant to Fed. R. Civ. p. 78.

Now, having read and considered the papers filed both in support of and in opposition to the motion, the Court hereby DENIES Gates' Motion for Summary Judgment.

Gates seeks summary judgment on the sole issue remaining in the case: whether the order to Officer Jackson to submit to a urine test was reasonable under the Fourth Amendment.[1] In Gates' first motion for summary judgment this Court made findings of uncontroverted fact which stand unchanged: Gates now submits no new facts or evidence. Rather, Gates

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[1]On July 19, 1988 this Court granted summary judgment in favor of Gates on all but one of the federal claims and on all of the pendant state claims brought by Jackson.

suggests that two recent Supreme Court decisions, National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384 (1989), and Skinner v. Railway Labor Executives' Assoc., 109 S.Ct. 1402 (1989), alter the reasonableness requirement of the Fourth Amendment such that, based on the Court's previous findings of fact, Gates is entitled to judgment as a matter of law.

Jackson claims that his Fourth Amendment right to be secure against unreasonable searches and seizures was violated when the Los Angeles Police Department ("LAPD"), without reasonable suspicion, ordered him to submit to a urine test and then fired him when he refused. Summary judgment on this issue was previously denied Gates because the Court found that a genuine

issue of material fact existed as to whether the LAPD had acted with reasonable suspicion. See Railway Labor Executives' Assoc. v. Burnley, 839 F.2d 575 (9th Cir. 1988) (called into question by Von Raab and Skinner, supra). The question before the Court now is whether, viewing the facts of this case in light of Van Kaab and Skinner, the Fourth Amendment permitted the LAPD to act only upon reasonable suspicion, or whether overriding governmental interests relaxed the operative standard to something less than reasonable suspicion.

In Von Raab the Supreme Court "reaffirm[ed] the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of

reasonableness in every circumstance." 109 S.Ct. at 1390. At times, the Government's needs may be "sufficiently compelling to justify the intrusion on privacy entailed by conducting . . . searches without any measure of individualized suspicion." Von Raab, 109 S.Ct. at 1392. In both Von Raab and Skinner, suspicionless searches in specific context were upheld.

In Von Raab, the Supreme Court held that suspicionless drug testing of all persons seeking promotion in the United States Customs Service to positions which involve narcotics interdiction and/or firearm handling is constitutional. In Skinner, suspicionless drug testing of railway employees who are involved in certain kinds of accidents or rule violations

was held constitutional.[2] Several factors essential to the holdings in Von Raab and Skinner are relevant in deciding Gates' second motion for summary judgment.

First, in both Von Raab and Skinner the Government demonstrated a compelling interest in ensuring that affected employees be drug-free. For example, "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety . . . 'presents "special needs" beyond normal law-enforcement that may justify departures from the usual warrant and probable-cause requirements.'" Skinner, 109 S.Ct. at 1414 (citing

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[2]The drug testing policies contemplated in Skinner are subject to Fourth Amendment constraints because they are either mandated or authorized by the Federal Railroad Administration.

Griffin v. Wisconsin, 107 S.Ct. 3164, 3168 (1987)). Similarly, within the Customs Service "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." Von Raab, 109 S.Ct. at 1393. When the Government's interest is sufficiently strong, the individual's right to privacy usually reflected in warrant and probable-cause requirements may hold less tenaciously.

Second, although in each case the Government's security interest was held to outweigh the individual's privacy interest, the drug policies scrutinized in Von Raab and Skinner are calculated to minimize the intrusive nature of the suspicionless search and to preserve the dignity of employees subject to testing. This is achieved primarily by

giving notice to affected employees. In Von Raab, for instance, the drug testing is in effect consensual: employees may choose whether or not to apply for promotion and are aware that a drug screen is part of the application process.[3] In Skinner, railway employees are fully apprised of the conduct and occurrences which lead to testing.

Third, and perhaps most importantly, in the drug policies contemplated in Von Raab and Skinner employees are "simply not subject 'to the discretion of the official in the

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[3]In Von Raab, United States Customs Service employees were also held to have "a diminished expectation of privacy in respect to the intrusions occasioned by a urine test' because "employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity." 109 S.Ct. at 1394.

field.'" Von Raab, 109 S.Ct. at 1391 (citing Camara v. Municipal Court, 387 U.S. 523, 532 (1967)). In each case, objective factors (e.g., a promotion, an accident) "trigger" the drug testing procedure. There is little place for discriminatory or arbitrary abuse of authority by the state.

Gates urges this Court to hold the conduct of the LAPD in Jackson analogous to the policies upheld in Von Raab arid Skinner. The Court, however, is unable to stretch so far. Even if the Government has a compelling interest in ensuring a drugfree police force, the amount of police discretion at issue in Jackson clearly distinguishes this matter from the limited scenarios of Von Raab and Skinner. In Jackson, there is no objective deterrent available to

prevent state abuse of discretion. The police in Jackson, after observing certain of their colleague Jackson's activities, formulated an individualized suspicion which led them to order Jackson to submit a urine sample. Gates has failed to identify in such conduct any limiting principle (for example, an objective "triggering" factor such as a promotion application or specific rule violation) which could serve to curb the authority of the police. In Jackson, the potential for police abuse and concomitant threat to individual privacy rights are strong enough that they cannot withstand an abrogation of the Fourth Amendment requirement of reasonable suspicion.

For the foregoing reasons the Court is unable to conclude that the decisions of the Supreme Court in Von

Raab and Skinner entitle Gates to summary judgment as a matter of law. As a result, there remain genuine issues of material fact pursuant to the previous denial of summary judgment.

Gates' request for certification for interlocutory appeal is DENIED.

IT IS SO ORDERED.

DATED: July 31,1989

RONALD S. W. LEW
United States District Judge

CV 87-1085-RSWL, Jackson v. Gates,
Second Motion for Summary Judgment and
Request for Certification for
Interlocutory Appeal.

Filed July 31, 1989

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHNNY LEE JACKSON, Plaintiff,	No. D.C. No. CV-87-105 RSWL
v.	ORDER
DARYL GATES; CITY OF LOS ANGELES, Defendants,	

Defendants City of Los Angeles and Daryl F. Gates, Robert Gil, Richard Bonneau, Barry Morrison, and Steve Murphy filed a motion for summary judgment scheduled for hearing on October 31, 1988. Plaintiff Johnny Lee Jackson also filed a motion for partial summary judgment or summary adjudication of issues scheduled for hearing on the same date. After oral argument for both motions, the Court

requested further briefing from the parties. Plaintiff was to submit his briefs on November 30, 1988 and defendants were to submit their opposition by December 14, 1988. Plaintiff's reply was due on December 21,1988.

On December 21, 1988, the Court took the matter under submission for disposition on all of the papers filed in support of and in opposition to the motions, oral argument presented at hearing, and all of the information contained within the additional briefs. The defendants' and plaintiff's motions contain and address both similar and identical issues. Accordingly, in effort to avoid repetition, the Court addresses both of the pending motions through this Order. After careful

consideration, the Court hereby issues the following:

Defendants' motion for summary judgment is granted in part and denied in part. Plaintiff's motion for partial summary judgment or summary adjudication of issues is denied.

Defendants contend that the uncontroverted facts disclose no unconstitutional municipal policy. This matter deals with Article 37 of the Memorandum of Understanding ("MOU") between the City of Los Angeles and the Police Protective League the authorized bargaining agent for the police officers. Defendants allege that there is no evidence that suggest this particular MOU is a policy or custom that deprives fourth amendment rights. A municipal body can be sued directly under 42 U.S.C. § 1983 for monetary

relief where the unconstitutional action implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The burden of proving that such a policy exists rests on the party who makes that assertion. St. Louis v. Praprotnick, 485 U.S., 108 3 S.Ct. 915, 926, 99 L.Ed.2d 107, 121 (1988). There must also be a causal relationship between the policy and the claimed deprivation. City of Oklahoma City v. Tuttle, 471 U.S. 808, 817, 61 105 S.Ct. 2427, 85 L.Ed.2d 791, 800 (1985), reh'g. denied, 473 U.S. 925, 106 S.Ct. 16, 87 L.Ed.2d 695 (1985).

Plaintiff makes the argument that he was removed solely because he failed

to submit to an unreasonable search. The policy plaintiff complains of is the "obey now - grieve later" portion of the insubordination policy. In this circuit, a policy itself need not be unconstitutional, it need only cause a constitutional violation. McKinley v. City of Eloy, 705 F.2d 1110, 117 (9th Cir. 1983).

The Supreme Court in Monell stated that " . . . Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." Monell at 692. Plaintiff claims that the constitutional tort in this matter was the alleged violative order to be searched, which was the proximate cause of plaintiff's removal. As stated in McKinley, supra, even though a removal

order based on insubordination was not constitutionally wrong, it caused a constitutional violation in deprivation of plaintiff's rights. Accordingly, in this instance it is possible for the City of Los Angeles to be liable for causing a constitutional violation, even if the insubordination removal policy was constitutional. Defendant Gates contends that there are no facts or allegations that connect him to the order to plaintiff to submit to a urine test and therefore he had nothing to do with plaintiff's alleged constitutional deprivation. In discharging plaintiff, Gates acted as the policy making official of the city. Municipal liability attaches where the unconstitutional deprivation is the result of an act within the authority of policy making official of the city.

See Los Angeles City Charter, §§ 78, 80, 198, 199, and 202. Furthermore, the duration of the constitutional deprivation of plaintiff's fourth amendment rights, if such deprivation occurred, is a question of fact. Cf. Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987) 5 (where the court noted that the plaintiff's continued employment as a municipal fireman was contingent upon his subjection to an administrative investigation and, therefore, it was necessary to examine whether the "search" offended the fourth amendment). In following, it is possible that Jackson's refusal to submit to a urinalysis would have, and could have, culminated in his suspension from the police department. Therefore, the policy of suspension for refusing to submit to such a test is a

part of the policy which the plaintiff alleges is an unreasonable search and seizure. In accordance with Monell, defendant Gates cannot be excluded as a defendant. The individual defendants contend that they are entitled to qualified immunity and, therefore, they are entitled to summary judgment. Where one's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have know, then qualified immunity will attach. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). Police officers are entitled to this type of immunity. See Pierce v. Ray, 386 U.S. 547, 557, 87 S.Ct. 1213, 1219, 18 L.Ed.2d 288, 296 (1967).

Individual defendants contend that the law regarding urine testing for

drugs was not established at the time of this alleged violation. If controlling law is not clearly established, a reasonable person would not be expected to know how to structure his conduct in order to avoid liability and in such instance, a defendant will be immune from suit. Todd v. U.S., 849 F.2d 365, 368-9 (9th Cir. 1988). Plaintiff cites to approximately two pages of cases in their opposition stating that there is a clear standard regarding public employee drug testing. However, all of the cases cited to were decided in 1986 or afterwards. The pertinent incident, in this matter,occurred in February 1986. Accordingly, plaintiff's attempts to prove the existence of controlling law is unpersuasive. Plaintiff further counters that there

was no "reasonable individualized and articulated suspicion" and, therefore, the individual defendants should have known their acts were wrong. However, where officials are sued for constitutional violations, they do no lose their qualified immunity because their conduct violates some statutory or administrative provision. Davis v. Scherer, 468 U.S. 183, 194, 104 S.Ct. 3012, 3019, 82 L.Ed.2d 139, reh'g. denied, 468 U.S. 1226, 105 S.Ct. 26 (1984). Accordingly, the individual defendants are entitled to summary judgment as they are immune from the alleged liability of their acts. Plaintiff contends that the order to him to submit to the urinalysis was not supported by a "reasonable individualized and articulated suspicion" that the test would show

evidence of drug use. The standard for compelling or mandating a public employee to submit to an observed urinalysis is met whether there exists a "reasonable individualized and articulated suspicion" of drug use, impairment or ingestion. Railway Labor Executives' Association v. Burnley, 839 F.2d 575 (9th Cir. 1988), cert. granted, 108 S.Ct. 2033, 100 L.Ed.2d 618 (1988). This is not disputed by the parties. However, the Court has previously addressed this identical issue in the Order of July 19, 1988. Plaintiff next contends that summary adjudication should be granted on the basis that a municipal policy operated to deprive plaintiff of his constitutional rights, namely the fourth amendment, and that, therefore the City of Los Angeles is liable for

the discharge of plaintiff. As stated above, the Court finds that there is a triable issue of fact. Plaintiff's argument that the individual defendants are not entitled to claim the qualified immunity defense has been addressed hereinabove.

Last, plaintiff argues that defendants are collaterally estopped from relitigating whether they had substantial evidence of ingestion to order the test. Plaintiff relies upon the fact that the arbitrator, who was fully empowered to conduct a hearing de novo did not take in such evidence because the parties stipulated to the arbitrator's review of the transcript and exhibits of the Board of Review. In Elrich v. Remas, 839 F.2d 630, cert. denied, 102 S.Ct. 60, 102 L.Ed.2d 38 (9th Cir. 1988), the Ninth Circuit held

that federal courts would accord collateral estoppel to municipal administrative hearing that have sufficient judicial safeguards. An examination was made to determine whether collateral estoppel should apply in People v. Sims, 32 Cal.3d 468 (1982). The Court examined the following factors in Sims:

1. Whether an administrative agency acted in a judicial capacity and resolved disputed issues of fact properly before it which the parties had an adequate opportunity to litigate;

2. Whether the general col lateral estoppel criteria apply.

At the administrative hearing in Elrich, supra, both parties were represented by counsel, twenty-one sworn witnesses testified, subpoenas were issued and both parties presented oral argument and written memoranda. The Ninth Circuit in Guild Wineries and Distilleries v. Whitehall Co., 853 F.2d 755 (9th Cir. 1988) noted that res judicata applied to judicial proceedings when the administrative agency acted in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. In those instances, courts should not hesitate to apply res judicata. Id. at 759.

There is a fundamental difference in the facts before this Court. Before the arbitrator below, no live evidence

heard and considered since the parties stipulated to the record from the Board of Review. Furthermore, the arbitrator was determining whether the order was reasonable in light of the policy of the Los Angeles Police Department's policy, not whether it was reasonable under the fourth amendment.

Therefore, the arbitrator addressed a different issue from this Court and collateral estoppel will not apply.

IT IS HEREBY ORDERED:

The individual defendants are entitled to qualified immunity and accordingly, they are entitled to summary judgment. The remainder of defendants' motion for summary judgment is denied. Plaintiff's motion for summary judgment is denied. As the trial date for this matter was

previously vacated, the status conference is set for March 27, 1989 at 9:00 A.M. before this Court. In light of the recent U.S. Supreme Court's decisions regarding drug testing of government employees, counsel should be prepared to discuss the impact those decisions have on this matter.

DATED: March 22, 1989

RONALD S. W. LEW
United States District Judge

Filed March 22, 1989

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHNNY LEE JACKSON, Plaintiff, v. DARYL GATES; CITY OF LOS ANGELES, Defendants,	No. D.C. No. CV-87-105 RSWL ORDER

Defendant filed a motion for summary judgment that was set for hearing on May 23, 1988. After listening to oral argument on that date, the Court took this matter under submission. Having read and considered all of the papers filed in support of and in opposition to said motion, as well as all of the pleadings on file with the Court and the oral arguments

offered by the parties, the Court issues the following ruling.

Defendants' motion is denied in part and granted in part.

The Court finds the existence of a triable issue of material fact as to whether the order to Officer Jackson to submit to a urine test was reasonable. As the Ninth Circuit recently reiterated in Railway Labor Executives' Assoc. v. Burnley, 839 F.2d 575 (9th Cir. 1988):

> "(P)ublic employer intrusions on the constitutionally protected privacy interests of government employees for work-related purposes and for investigations of work-related misconduct should be judged by a standard of

reasonableness under all circumstances." Id. at 582 (citing O'Connor v. Ortega, ___U.S.___, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987).

This question, in light of the record before the Court, raises a triable issue of material fact, and thus, cannot be decided by summary judgment. The fact that plaintiff refused to comply with the order to take the urine test does not negate the possibility that his fourth amendment rights may have been violated. A violation can exist even where the search is not made, when refusal to comply carries the consequence of lossing (sic) one's job. Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). Accordingly, the Court rejects

defendants' unsupported assertion to the contrary.

However, aside from the questions of fact remaining with regard to plaintiff's alleged deprivation of his fourth amendment right to be free from unreasonable search and seizure arising from the order to submit to the urine test, the Court finds no controverted issues of material fact with respect to the other constitutional deprivations alleged by plaintiff and grants a partial summary judgment in favor of defendants as to them pursuant to the accompanying Findings of Uncontroverted Facts and Conclusions of Law signed by the Court and filed herewith.

As to plaintiff's pendent state claims, the Court exercises its sound discretion and dismisses them based on

its finding that these state claims would tend to predominate over the remaining federal claim in terms of proof, scope of the issues raised, and comprehensiveness (sic) of the remedies sought, and the further finding that inclusion of these state claims would unduly prolong the trial. United Mine Workers v. Gibbs, 383 U.S. 715, 733, 16 L.Ed.2d 218, 232, 86 S.Ct. 1130 (1966).

Accordingly, the Court HEREBY DENIES defendants' motion as to plaintiff's 42 U.S.C. § 1983 claim based upon a deprivation of plaintiff's fourth amendment rights to be free from unreasonable search and seizure arising from the order that he submit to a urine analysis test.

IT IS FURTHER ORDERED that partial summary judgment on the remaining issues with respect to all other

constitutional deprivations alleged by plaintiff is HEREBY GRANTED.

IT IS FURTHER ORDERED that plaintiff's pendent state claims are HEREBY DISMISSED without prejudice.

IT IS SO ORDERED.

DATED: 7-15-88

RONALD S. W. LEW
United States District Judge

Filed July 19, 1988